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Karn Woon Lin & Anor v Cheah Chor Bok

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02–1155 OF 2010
MOHD HISHAMUDIN, ZAHARAH IBRAHIM AND AZAHAR MOHAMED JJCA
13 MARCH 2013

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Succession — Probate — Validity of will — Conflict of wills — Parties appointed as executors, trustees and beneficiary of two different wills — Prevalence of will — Burden of proving testamentary capacity — Whether there were suspicious circumstances that vitiated making of second will

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The present appeal stemmed from a dispute between the appellants ('the plaintiffs') and the respondent ('the defendant') regarding a will made by the deceased. The defendant was the estranged brother of the deceased while the first plaintiff was a close friend of the deceased. The deceased had appointed the plaintiffs to be the executors and trustees and their daughter as the sole beneficiary of the deceased's estate ('the first will'). However, conflict ensued when a second will emerged, naming the defendant as the sole executor and trustee and also the sole beneficiary of the deceased's estate ('the second will'). In the High Court, the plaintiffs disputed the second will, claiming for a declaration that the first will was the last true and valid will; revocation of the second will and declaration that it was null and void; and for an account by the defendant for the assets of the deceased collected and used by the defendant. The defendant counterclaimed for a declaration that the second will was the last true and valid will and that it superseded all earlier wills; for an account by the plaintiffs of all the monies withdrawn by the first plaintiff and all assets of the deceased collected, removed or used by the deceased; and an order that the private caveat lodged by the plaintiffs against the property of the deceased be removed. The High Court judge dismissed the plaintiffs' claim and allowed the defendant's counterclaim. In the present appeal, the plaintiffs couched their submission on the argument that based on the documentary evidence adduced, the High Court judge ought to have held that the defendant had failed to discharge the burden of proving testamentary capacity. The second issue that was raised was whether there were 'suspicious circumstances' that vitiated the making of the second will.

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Held, dismissing the appeal:

(1) The issue as to which of the two wills should be admitted to probate would very much depend on the facts of the particular case. Although the deceased was at times in a confused state and depressed when she was

admitted into the hospital, there was no evidence of mental disorder or delusion. The judgment did not contain any error warranting appellate interference. It had not been established that the deceased lacked mental capacity when she made the second will. There was no evidence that can support any finding of a lack of testamentary capacity (see paras 14 & 18).

(2) On consideration of the evidence and the material available, there was more than sufficient admissible evidence to support the learned judge's findings. Although the defendant benefited under the second will, he was not the writer and neither did he prepare it. It was prepared by a lawyer. The deceased had approved the will and had attested to it. The thumb printing of the second will was the culmination of her intention to change her will and leaving everything to the defendant, her own brother (see para 22).

(3) The evidence of 'suspicious circumstances' relied on by the plaintiffs, particularly that the deceased had a feeble mind and lacked understanding because of her disease, all related to matters and events that took place either before or after the making of the will. The so-called 'suspicious circumstances' therefore did not relate to the making of the second will (see para 23).

[Bahasa Malaysia summary

Rayuan ini berasal daripada pertikaian di antara perayu-perayu ('plaintif-plaintif') dan responden ('defendan') berkenaan wasiat yang dibuat oleh si mati. Defendan adalah saudara lelaki si mati yang telah lama renggang sementara plaintif pertama adalah rakan rapat si mati. Si mati melantik plaintif-plaintif menjadi pentadbir-pentadbir and pemegang-pemegang amanah dan anak perempuan mereka sebagai satu-satunya benefisiari estet si mati ('wasiat pertama'). Walau bagaimanapun, pertikaian berlaku apabila wasiat kedua muncul, menamakan defendan sebagai satu-satunya pentadbir dan pemegang amanah dan juga satu-satunya benefisiari estet si mati ('wasiat kedua'). Di Mahkamah Tinggi, plaintif-plaintif mempertikaikan wasiat kedua, menuntut untuk perisytiharan bahawa wasiat pertama adalah wasiat terakhir yang betul dan sah; membatalkan wasiat kedua dan perisytiharan yang ianya terbatal dan tak sah; dan untuk pengiraan oleh defendan untuk aset-aset si mati yang diambil dan digunakan oleh defendan. Defendan menuntut balas untuk perisytiharan bahawa wasiat kedua adalah wasiat terakhir yang betul dan sah dan ia menggantikan kesemua wasiat yang terdahulu; untuk pengiraan oleh plaintif-plaintif terhadap kesemua wang yang diambil oleh plaintif pertama dan kesemua aset si mati yang diambil, dipindahkan atau digunakan oleh si mati; dan perintah bahawa kaveat persendirian yang dimasukkan oleh plaintif-plaintif terhadap hartanah si mati tersebut dipotong. Hakim Mahkamah Tinggi menolak tuntutan plainitf-plaintif dan membenarkan tuntutan balas defendan. Dalam rayuan ini, plainitf-plaintif mendasarkan

A hujahan mereka atas hujahan bahawa berdasarkan atas keterangan dokumen yang dikemukakan, hakim Mahkamah Tinggi patut memutuskan bahawa defendan telah gagal untuk membuktikan beban pembuktian kapasiti menurut wasiat. Isu kedua yang dibangkitkan adalah sama ada terdapat 'suspicious circumstances' yang menjadikan pembuatan wasiat kedua tersebut
B tak sah.

Diputuskan, menolak rayuan:

(1) Isu terhadap kedua-dua wasiat tersebut patut dimasukkan untuk probet
C akan bergantung sepenuhnya atas fakta kes tertentu. Walaupun si mati kadang kala berada dalam keadaan yang keliru dan tertekan apabila dia dimasukkan ke dalam hospital, tidak terdapat keterangan kecelaruan mental atau delusi. Penghakiman tersebut tidak mengandungi apa-apa kesilapan yang mewajarkan campur tangan mahkamah rayuan. Ia tidak
D dibuktikan bahawa si mati kekurangan kapasiti mental apabila dia membuat wasiat kedua. Tidak terdapat keterangan yang boleh menyokong apa-apa dapatan kekurangan keupayaan perwasiatan (lihat perenggan 14 & 18).

(2) Atas pertimbangan keterangan dan material yang sedia ada, terdapat
E keterangan yang lebih mencukupi untuk menyokong dapatan hakim yang bijaksana. Walaupun defendan mendapat faedah di bawah wasiat kedua, dia bukan penulis dan dia juga yang bukan menyediakannya. Ia disediakan oleh peguam. Si mati telah meluluskan wasiat tersebut dan telah mengakuinya. Tanda ibu jari di atas wasiat kedua adalah kemuncak
F niatnya untuk menukar wasiatnya dan meninggalkan kesemuanya kepada defendan, saudara lelakinya (lihat perenggan 22).

(3) Keterangan 'suspicious circumstances' yang digunakan oleh plaintif-plaintif, terutamanya bahawa si mati mempunyai minda yang
G lemah dan kekurangan pemahaman penyakitnya, kesemua berkait kepada perkara-perkara dan kejadian-kejadian yang mengambil tempat sama ada sebelum atau selepas pembuatan wasiat tersebut. Oleh itu 'suspicious circumstances' yang disebut itu tidak berkait dengan pembuatan wasit kedua tersebut (lihat perenggan 23).]

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Notes

For cases on validity of will, see 11 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2574–2584.

I **Cases referred to**

Eastern & Oriental Hotel (1951) Sdn Bhd vs Ellarious George Fernandez & Anor [1989] 1 MLJ 35, SC (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)

Kishan Singh v Nichhattar Singh & Ors AIR 1983 PH 373, HC (refd)
Lee Eng Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97, CA (refd)
Lim Kim Chet & Anor vs Multar bin Masngud [1984] 2 MLJ 165 (refd)
Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1993] 1 MLJ 113, SC (refd)
Tho Yow Pew & Anor v Chua Kooi Hean [2002] 4 MLJ 97; [2002] 4 CLJ 90, CA (refd)

Appeal from: Civil Suit No 22–730 of 2009 (High Court, Pulau Pinang)

T Gunaseelan (Balwant Singh with him) (Balwant Singh & Co) for the appellants.
Chuah Chong Ewe (Ng & Anuar) for the respondent.

Azahar Mohamed JCA (delivering judgment of the court):

[1] This was an appeal by the appellants (the plaintiffs in the High Court) against the decision of the learned judge of the Penang High Court given on 13 April 2010 dismissing the appellant's claim and allowing the counterclaim of the the respondent (the defendant in the High Court).

[2] We heard the appeal, wherein at its conclusion we unanimously dismissed it with costs. We now give our reasons for so deciding. For convenience and ease of reference, we will refer to parties in this judgment to the title assigned to them in the court below.

[3] We shall begin by giving brief antecedent facts of the case giving rise to this appeal. Cheah Keat Lim ('the deceased') was a widowed school teacher and lived alone with her pet dogs in her own home at No 50 Moulmein Road, Penang until she died on 26 June 1999. The deceased had a blood brother, the defendant, with whom she had been estranged for over 20 years. Her close friend was the first plaintiff, who was a school clerk at Convent Pulau Tikus, the same school in which she was a teacher. They were close friends to the extent that the deceased treated the first plaintiff's daughter named Pauline as her goddaughter. On 29 March 1989 the deceased made a will ('the first will') as follows:

> I, CHEAH KEAT LIM (NRIC No. 2205673) of No. 50, Moulmein Road, 10350 Penang hereby revoke all former Wills and Codicils made by me and declare this to be my last Will.
>
> 1 I appoint KARN WOON LIN (NRIC No. 0291333) and LIM CHIN HOCK (NRIC No. 2519661) both of No. 107, Jalan Bagan Serai, 11600 Penang to be the executors and trustees of this my Will (hereinafter referred to as 'my Trustees').

2 I DEVISE AND BEQUEATH all my immovable and movable property whatsoever and wheresoever of or to which I shall possessed or entitled at the time of my death or over which I shall have any general power appointment or disposition by Will (except property otherwise disposed of by this my Will or any Codicil hereto) unto my Trustees to hold on trust for PAULEEN LIM HOOI FERNG, an infant born on the 24th day of February, 1987 and having a birth certificate bearing registration no. H 120772.

[4] There is no dispute in respect of the first will. It was signed by the deceased. The plaintiffs are the executors and trustees appointed under the first will and their daughter is named as the sole beneficiary of the deceased's estate.

[5] However, as it turned out, on 16 April 1999 the deceased made another will ('the second will') as follows:

I, Madam CHEAH KEAT (New NRIC No. 391002-07-5368, Old NRIC No. 2205673) of No. 50 Jalan Moulmein 10350 Penang do hereby revoke and cancel all my former wills, codicils and testamentary dispositions and declare this to be my Last Will and testament.

I do hereby appoint my brother CHEAH CHOR BOK (New NRIC No. 310825-07-5087, Old NRIC No. 0276736) of No. 29 Lebuhraya Halia, Tanjong Tokong 10470 Penang to be the sole Executor and Trustee of this my Will. He shall be the sole beneficiary of my Estate and effects.

I do hereby bequeath devise and leave all my properties whatsoever and whatsoever (including my house No. 50 Jalan Moulmein, Penang) to the said CHEAH CHOR BOK for him to hold in trust and to enjoy absolutely upon or after death after payment of all my funeral and testamentary expenses.

[6] By the second will, the defendant is named the sole executor and trustee and also the sole beneficiary of the deceased's estate. The deceased had thumb-printed the second will.

[7] The plaintiffs disputed the second will. As indicated earlier, the deceased died on 26 June 1999. The cause of her death was cerebral toxoplasmosis and brain stem metastasis.

[8] This is a factually based appeal essentially revolves around the issue as to which of the two wills of the deceased should be admitted to probate.

[9] The plaintiffs' claim is mainly for the following:

(a) for a declaration that:

(i) the will of Cheah Keat Lim, deceased dated 29 March 1989 is the last true and valid will of the deceased which should be admitted to probate in solemn form;

(ii) the second will dated 16 April 1999 is revoked and is null and void; A

(b) for an account by the defendant for the assets of the deceased collected and used by the defendant from the date of her admission into Gleneagles Medical Centre.

B

[10] The defendant's counterclaim is for the following:

(a) a declaration that will of the deceased dated 16 April 1999 is the last true and valid will and that it superseded all earlier wills;

(b) for an account by the plaintiffs of all the monies withdrawn by the first plaintiff and all assets of the deceased collected, removed or used by the deceased prior to 11 April 1999; and C

(c) an order that the private caveat lodged by the plaintiffs against the property of the deceased be removed forthwith.

D

[11] After a full trial, as we have indicated earlier, the learned judge dismissed the plaintiffs' claim against the defendant and allowed the defendant's counterclaim against the plaintiffs.

E

[12] The learned judge held that on the totality of the evidence, the defendant as the propounder of the second will, had discharged the burden of proving the deceased's testamentary capacity. Before us, learned counsel for the plaintiffs argued that based on the evidence adduced, such as documentary evidence in the form of medical reports, MRI report and nursing notes, the learned judge ought to have held that the defendant had failed to discharge the burden of proving testamentary capacity. Based on the facts of this case, we were unable to agree with the arguments of learned counsel for the plaintiffs. F

[13] It is an established principle of law that for a will to be valid, a testator must have testamentary capacity (see *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1). In the case of *Lee Eng Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97, the Court of Appeal has comprehensively explained what is meant by testamentary capacity, which can be summarised as follows: What the law primarily looked for as vitiating testamentary capacity was mental disorder or insane delusion. Mere bodily ill-health or imperfect memory was insufficient. Testamentary capacity was not to be equated with contractual capacity. A person may lack the mental capacity to enter into a contract and yet may have sufficient testamentary capacity. The relevant and material point of time to consider the mental capacity of the deceased was the time at which the will was made and not at some other earlier or later point of time. G H I

[14] With these principles in mind, in our view the issue as to which of the

two wills should be admitted to probate would very much depend on the facts of this particular case. It is important to note that the deceased was admitted into Gleneagles Medical Centre on 7 April 1999 and was under the care of Dr Gunasekaran ('DW2'). It is true that while in the hospital, the deceased was at times in a confused state and depressed. However, there is no evidence of mental disorder or delusion. According to DW2 upon her discharge from the hospital on 15 April 1999, the deceased was alert and in satisfactory condition and ready for home. The defendant and his cousin ('DW4') then accompanied the deceased to Public Bank in Pulau Tikus to open her safe deposit box. She spent sometime at the bank to wait for the first plaintiff but she never showed up. The deceased went home after the bank manager ('DW5') received a letter from the first plaintiff's lawyer regarding the opening of the safe deposit box. According to DW5, the deceased was angry and upset with the conduct of the first plaintiff and complaining about being cheated by her and describing her as being ungrateful. DW5 also testified that the deceased was wheel chair bound and weak but knew what she was doing. The deceased then asked the defendant to help her and at the same time telling him that she wanted to give everything him.

[15] The same afternoon, the defendant and DW4 went to a lawyer's office and met one Mr Annamalai who has since died. The next day, on 16 April 1999 Mr Annamalai and a staff from his office came over to the deceased's house where the second will and a power of attorney was prepared and thumb printed by the deceased. According to the defendant, the deceased was not able to write but thumb printed the second will and the power of attorney. She spoke normally and coherently when questioned by Mr Annamalai and was alert although physically weak. This part of the evidence of the defendant is corroborated by DW4.

[16] In his judgment, the learned judge arrived at the following conclusions, after a careful and thorough analysis of the entire evidence and case law authorities:

> From the evidence of DW1, DW4 and DW5, it is my considered view that at the material time namely on 16 April 1999, the time of the making the impugned will, the deceased was aware of what she was doing and know exactly the nature of her acts. There is no sufficient reason for this court to disbelief or reject the evidence of these witnesses. The evidence of DW5 especially, who is totally independent and a disinterested party to the transaction, when seeing the deceased coming to the bank to open her safe deposit box, speaks a lot about the mental faculty of the deceased on 15 April 1999 just a day before the making of the will. This is further affirmed by the evidence of DW1 and DW4. As to the most material date of 16 April 1999, the evidence of DW1 and DW4 leaves me in no doubt as to the ability and understanding of the deceased in making the will. I am also fully appraised of the fact that while the testator's mental condition on the day of the execution of the

alleged will is important, a determination of that mental condition should not be confined to what was perceived on just that day only.

[17] Very much relevant for discussion is the fact that the deceased suffered from brain cancer and that brain cancer had caused her death. In *Kishan Singh v Nichhattar Singh & Ors* AIR 1983 PH 373, a deaf and dumb person who was suffering from cancer of his back and head made a will. It was held that the mere fact that the deceased was having cancer of the back did not mean that he was not in a fit mental condition to make the will and that a testator of a will does not have to be found to be in a perfect state of health to have his will declared valid. The court further held that the only criterion is that the testator was capable of understanding the nature of his act and the mere fact that the propounder of the will was present at the time of the execution of the will alone is not sufficient to doubt the genuineness of the will. In our present appeal, the learned judge was very much alive to the deceased's state of health. In relation to this, the learned judge, after carefully reviewing the evidence, made specific findings concerning this issue as follows:

> At most, the evidence of DW2 merely shows that the deceased while in the hospital was at times, in a confused state. That condition of confused state was on and off. Confusion, in my view is not incapacity. In any event both doctors, DW2 and DW3 further confirm that the will made on 16 April 1999 could also have been done when the deceased was experiencing a lucid interval. Lucid interval according to DW2 refers to the period when the patient is fully oriented and rational and aware of everything.

[18] Based on the evidence, it is true that the defendant, the brother of the deceased and the sole beneficiary under the second will, had been estranged from the deceased and did not have any ties with her for nearly 20 years before he met her on 12 April 1999. The deceased was admitted to Gleneagles Medical Centre on 7 April 1999 by the first plaintiff and was being treated there until her discharge on 15 April 1999. The second will was made on 16 April 1999 that is, just four days after the defendant met the deceased after a lapse of 20 years and just one day after the discharge of the deceased from Gleneagles. The first time the defendant met the deceased was through the assistance of DW4. In our judgment, the learned judge had meticulously considered all the entire evidence concerning the testamentary capacity of the deceased at the time the second will was made. He took special care to consider and judicially appreciate the evidence at some length before coming to a definite finding of fact. Nothing more may fairly be expected of the learned judge on this issue. Having considered the entire evidence in the appeal records, we agree with the findings of the learned judge. The judgment does not contain any error warranting an appellate interference. In our judgment, it has

not been established that the deceased lacked mental capacity when she made the second will. There is no evidence that can support any finding of a lack of testamentary capacity.

[19] We turn next to the second issue which was argued before us: whether there were 'suspicious circumstances' that vitiated the making of the second will. It was argued that that there was collusion between DW1, DW4 and Mr Annamalai and further there was fraud committed by DW1 and DW4. In this regard, suspicious if any must relate to circumstances surrounding the making of the will and not to the testamentary capacity of the testator (see *Tho Yow Pew & Anor v Chua Kooi Hean* [2002] 4 MLJ 97; [2002] 4 CLJ 90).

[20] In our judgment, the issue of 'suspicious circumstances' was decided wholly on the facts and the prevailing circumstances of the case, based on the credibility of the witnesses and the inherent probabilities of their testimonies. In the words of the learned judge:

> In the consideration of the evidence, I am unable to find sufficient evidence to support the plaintiff's allegation of fraud against DW1 and DW4 and also the allegation of their conspiracy with Annamalai. The evidence given by the plaintiff is not sufficient to prove fraud and conspiracy against those alleged and the plaintiff has failed to meet the standard of proof required to prove fraud and has not discharged the burden which she carries.

[21] Further down in his judgment, the learned judge said as follows, which we respectfully agree with him:

> In my view what is and what is not suspicious circumstances depends very much of the facts and circumstances of each case. It does not surprise me a bit that the defendant who has been estranged from the deceased for 20 years suddenly became the sole beneficiary of the deceased's will. After all, the defendant is her own brother and the deceased has felt betrayed and was cheated by the first plaintiff. She was angry with her and that prompted her to change her will. As to the none signing of the will but was only thumb printed, there is sufficient medical reason to explain that, and in any event, a thumbprint is just another mode of attestation.

[22] In our judgment, on consideration of the evidence and the material available on the records of appeal, there was more than sufficient admissible evidence to support the learned judge's findings. It is important to note that although the defendant benefited under the second will, he is not the writer and neither did he prepare it. It was prepared by Mr Annamalai. The deceased had approved the will and had attested to it by thumb printing the same, witnessed by DW4 and an employee of Mr Annamalai. The thumb printing of the second will on 16 April 1999 was the culmination of her intention to change her will and leaving everything to the defendant, her own brother.

[23] We are also of the considered view that the evidence of 'suspicious circumstances' relied on by the plaintiffs, particularly that the deceased had a feeble mind and lacked understanding because of her disease, all relate to matters and events that took place either before or after the making of the will. The so called 'suspicious circumstances' therefore do not relate to the making of the second will.

[24] It is trite law that an appellate court would be slow to disturb a trial court's finding of facts in the absence of any perverse and unwarranted finding on the totality of the evidence before it. The cases of *Tan Sri Khoo Teck Puat & Anor vs Plenitude Holdings Sdn Bhd* [1993] 1 MLJ 113; *Eastern & Oriental Hotel (1951) Sdn Bhd vs Ellarious George Fernandez & Anor* [1989] 1 MLJ 35 and *Lim Kim Chet & Anor v Multar bin Masngud* [1984] 2 MLJ 165 are some of the authorities to support the cardinal principle that an appellate court should be slow in interfering with a finding of fact of the trial court which had observed the demeanour and heard the witnesses before coming to its conclusion. In the present appeal, it has not been successfully shown to us that the findings of the learned judge is against the weight of evidence or perverse in any way. The judgment of the learned judge does not contain any serious error warranting appellate interference.

[25] It is for all these reasons that we had dismissed this appeal with costs of RM60,000 in favour of the defendant. The deposit to the defendant to account of fixed costs.

Appeal dismissed.

Reported by Afiq Mohamad Noor